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April 29, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 24, 2004

Case No.: TIA-0223

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Physician Panel and the Panel), which determined that the Applicant's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a) (2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a lab technician at the Savannah River Site (the plant). He worked at the plant for approximately 39 years, from 1954 to 1993.

The Applicant filed an application with the OWA, requesting physician panel review of his blood disorder and degenerative arthritis of the hip leading to a hip replacement. The Applicant claims that his conditions were due to exposures to toxic and hazardous materials during the course of his employment.

The OWA referred the matter to the Physician Panel, which issued a negative determination. As an initial matter, the Panel acknowledged radiation exposure but stated that it was not in excess of permissible limits. Turning to the claimed conditions, the Panel found that there was insufficient evidence establishing a link between the Applicant's workplace exposures and his conditions. In reference to the claimed blood disorder, the Panel stated that a low platelet count, unaccompanied by other blood abnormalities, was not associated

with radiation exposure. The Panel noted the Applicant's intermittent use of Naproxen has an association with hematologic abnormalities. With respect to his degenerative arthritis claim, the Panel stated that the condition is not associated with exposure to chemicals and radiation. See Physician's Panel Report. The OWA accepted the determination, and the Applicant appealed.

In his appeal, the Applicant contends that the Panel was in error when it stated that his dosimetry records never exceeded annual limits. The Applicant also contends that the Panel did not review all of his blood abnormalities and provided blood work lab results from 2003. See Applicant's Appeal Letter.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's contentions do not indicate material Panel error. The Panel found that neither of the Applicant's conditions was known to be associated with radiation exposure. Accordingly, whether the Applicant's radiation exposure ever exceeded annual permissible limits is not relevant to the Panel's analysis. The Applicant's argument that recent blood tests show additional blood abnormalities also does not indicate Panel error. Those test results were not part of the record that went to the Panel for review. If the Applicant wishes to have this new information considered, the Applicant should contact the DOL on how to proceed.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-223 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 29, 2005